UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

STEVEN HERBERT,	)	
	)	
Plaintiff,	)	
	)	
v.	)	1:12-CV-00222-JAW
	)	
STEPHEN MAKRECKY,	)	
	)	
Defendant	)	

MEMORANDUM OF DECISION ON
MOTION FOR ATTACHMENT AND TRUSTEE PROCESS

Plaintiff Steven Herbert, a resident of Washington State, has sued his step-father, Stephen Makrecky, of Belfast, alleging that Makrecky converted $83,000 that Herbert's mother gifted to Herbert prior to her death. Herbert has filed a motion requesting attachment, including attachment on trustee process, in the amount of $85,000. For reasons that follow, I grant the motion in the amount of $83,350.

ATTACHMENT AND TRUSTEE PROCESS STANDARDS

In accordance with Rule 64 of the Federal Rules of Civil Procedure and Local Rule 64, this court looks to Maine law and procedure in adjudicating a motion for attachment or trustee process. The plaintiff must show that it is more likely than not that he will recover judgment, including interest and costs, in an amount equal to or greater than the aggregate sum of the attachment or trustee process plus any insurance, bond or other security, and any property or credits attached by other writ of attachment or by trustee process shown by the defendant to be available to satisfy the judgment. Me. R. Civ. P. 4A(c)(g), 4B(c)(i). A motion for attachment or trustee process must be accompanied by an affidavit or affidavits setting forth "specific facts

sufficient to warrant the required findings and shall be upon the affiant's own knowledge, information or belief; and so far as upon information and belief, shall state that the affiant believes this information to be true." Me. R. Civ. P. 4A(i), 4B(c). In making the determination of whether or not the plaintiff is more likely than not to recover an amount equal to or greater than the amount of the attachment sought, the court should assess the merits of the complaint and the weight and credibility of the supporting affidavits. Plourde v. Plourde, 678 A.2d 1032, 1035 (Me. 1996). In addition to addressing the merits, sworn statements submitted in support of a motion for attachment must include sufficient information for the court to make a reasonable calculation of the amount of pecuniary and compensatory damages before entering an order. Wilson v. DelPapa, 634 A.2d 1252, 1255 (Me. 1993) (explaining that the rule amendment means the movant must convince the court by a preponderance of the evidence as to the amount of the recovery). Arguments of counsel cannot substitute for the required sworn statements necessary to support a motion for attachment. Wilson, 634 A.2d at 1254.

FACTUAL ALLEGATIONS AND ATTESTATIONS

Plaintiff Steven Herbert is the son of Jennifer Makrecky, recently deceased. Defendant Stephen Makrecky was the husband of Jennifer Makrecky. (Compl. ¶¶ 5-6.) During her lifetime, Jennifer Makrecky made an inter vivos gift to Plaintiff by delivering checks payable to Plaintiff in the amount of $83,000, which Plaintiff accepted. For reasons related in the affidavits, outlined below, Defendant was in a position to prevent Plaintiff from realizing the transfer of funds.

Plaintiff has sworn out an affidavit recounting the following sequence of events. Plaintiff's grandmother passed away in September 2011 and Plaintiff alleges that his mother inherited roughly $196,000 as the sole beneficiary. (Herbert Aff. ¶¶ 5-6.) Plaintiff attests that

his grandmother's estate issued several checks drawn on a Canadian bank and made payable to his mother in various denominations. Among these checks was one for $50,000 and one for $33,000 that his mother indorsed and hand delivered into his possession on March 18, 2012. (Id. ¶¶ 8-13.) Plaintiff attempted to deposit the checks into his bank account in his home state of Washington, but his bank declined to accept the "third-party" checks. (Id. ¶ 13.) When Plaintiff informed his mother that his bank would not accept the checks for deposit, she told him to send her the checks and said they would "figure it out." (Id. ¶ 14; Herbert Aff. Ex. 1 (e-mails).) Plaintiff mailed the checks to his mother and they were delivered to her address on March 27, 2012. (Herbert Aff. ¶ 15.)

Defendant attests that sometime in March 2012 he discovered two Canadian checks, one for $50,000 and another for $33,000 from the Estate of Joan Harrison (Plaintiff's grandmother) "in a pile of mail." (Makrecky Aff. ¶ 16.) The checks were indorsed on the back by his wife but were not made payable to the order of anyone in particular. (Id. ¶ 17.) Defendant inquired what to do with the checks and his wife indicated that he should deposit them into their joint account, which he did. (Id. ¶ 18.)

Plaintiff's mother went to her bank on April 4, 2012. She traveled there in the company of a friend, Denise Penaloza, though Ms. Penaloza did not go inside the bank with her. Ms. Penaloza attests that Plaintiff's mother explained to her that she had sent checks to Plaintiff and that his bank had refused to process them. She asked Penaloza to bring her to the bank so she could get a "bank draft" to send Plaintiff to replace the returned checks. (Penaloza Aff. ¶¶ 4-5.) Penaloza understood that Plaintiff's mother did acquire a bank draft for Plaintiff because they discussed whether Penaloza might deliver it to Plaintiff during her flight home to British Columbia, with a connection in Seattle, Washington. (Id. ¶ 8.) According to Penaloza,

Plaintiff's mother decided that she would mail the draft and indicated that she would send it after the Easter weekend. (Id.) Plaintiff's mother died on April 12, 2012, without mailing the draft. (Herbert Aff. ¶¶ 20-21.) Plaintiff "confronted" Defendant about the money but Defendant refused to discuss the issue. (Id. ¶ 22-23.)

Defendant attests that after his wife's death, he "discovered a check in the amount of $80,000 drawn from proceeds on our joint account." (Id. ¶ 20.) Defendant avers that "*other than*" this check he "never knew of, or exercised control of, any money or checks that [he] knew were intended for Plaintiff." (Id. ¶ 21 (emphasis added).) In addition to these representations, Defendant asserts that his wife was not competent in the days leading up to her death due to end-stage cancer and strong medications. (Id. ¶¶ 1-9.) These representations are countered in the affidavit submitted by Ms. Penaloza, who states that Jennifer Makrecky was coherent and easily understandable when she was with Penaloza and did not exhibit confusion, memory problems, or difficulty remembering things when she went to the bank to obtain the draft for Plaintiff, though Jennifer Makrecky did exhibit some confusion at times. (Penaloza Aff. ¶¶ 9-11.)

DISCUSSION

Plaintiff asserts that his presentation demonstrates his entitlement "to attachment of $85,000 based on Defendant's conversion, including interest and costs." (Mot. for Attachment at 2, ECF No. 3.) He contends that his mother made a valid inter vivos gift to him of $83,000, which he accepted, giving him a legal or equitable right to the proceeds of the instruments used to effectuate the gift. (Id. at 3.) Plaintiff contends that Defendant's withholding of the proceeds amounts to conversion of Plaintiff's property. (Id.)

"An effective inter vivos gift requires three elements: (1) donative intent; (2) delivery with intent to surrender all present and future dominion over the property; and (3) acceptance by

the donee." Westleigh v. Conger, 2000 ME 134, ¶ 7, 755 A.2d 518, 519. The tort of conversion entails an invasion of a party's possession or right to possession of property. Bradford v. Dumond, 675 A.2d 957, 962 (Me. 1996). The tort is established where the party claiming conversion shows that he (1) has a property interest in the property in question; (2) had the right to possess the property at the time of the alleged conversion; and (3) has made a demand for the property that has been refused by the property holder. Id.

Based on the affidavit evidence presented in this case, it is more likely than not that Plaintiff will obtain a judgment that he is entitled to recover the funds his mother gifted to him. As to the gift transfer, Plaintiff has demonstrated his mother's donative intent, her delivery of the estate drafts with intent to surrender her right to them, and his acceptance of the estate drafts, which were negotiable instruments gifted to him without condition. As to the conversion claim, Plaintiff has demonstrated a property interest in the proceeds of the drafts, a continuing possessory right in the gifted funds, and a demand and refusal communicated between himself and Defendant. Defendant's challenges, discussed below, consist of a series of arguments related to the conversion of money as a particular species of property, limits on the enforceability of negotiable instruments, whether his wife was competent to make a valid gift to Plaintiff, and whether he ever exercised "control" over any particular check. (Def.'s Opp'n, ECF No. 10.)

A. Conversion and Money

Defendant maintains that a conversion action is not appropriate when it comes to money, raising principles of debtor-creditor law, likening his wife to a debtor and arguing that a conversion action cannot lie to collect a debt. (Id. at 2.) Although Defendand is right that a conversion claim is not a valid means of collecting a debt, Plaintiff does not contend that there is a debtor-creditor relationship between himself and his mother or Defendant. Instead, he claims

the right to have the funds from his grandmother's estate that were gifted to him by his mother and are being withheld by Defendant.

Alternatively, Defendant contends that there cannot be a conversion claim for money unless Plaintiff can identify a "specific pile of money, or a specific check." (Id. at 3.) In fact, the common law of conversion reflects that a claim for conversion of money is permitted (whether in relation to currency or negotiable instruments), but that the claimant must point to specific and identifiable money that is meant for him, as opposed to a general obligation on the part of another to pay him money pursuant to a contract. E.g., Hazelton v. Locke, 104 Me. 164 (1908); Andrews v. Raphaelson, 346 Fed. Appx. 198, 199 (9th Cir. 2009) (applying Nevada law); Tambourine Comercio Int'l SA v. Solowsky, 312 Fed. Appx. 263, 272 (11th Cir. 2009) (applying Florida Law).[1] Here, Plaintiff has identified a specific sum of money ($83,000) consisting in the proceeds of the estate drafts.

B. Non-delivery of Mother's Draft

Defendant states that it "appears Plaintiff is contending that the conversion occurred when Defendant allegedly refused to deliver an $83,000 check to him." (Def.'s Opp'n at 3.) Defendant thereafter argues that non-delivery of his wife's check precludes Plaintiff from claiming entitlement to the check because Plaintiff cannot be regarded as a "holder in due course" of his mother's check unless it was "negotiated" to him through delivery. (Id., citing 11 M.R.S. §§ 3-1104(3), 3-1201(1), 3-1203.) Plaintiff responds that the UCC has nothing to do with this action and that he is "not seeking to enforce an instrument" but rather to obtain "the monies that are represented by this draft, which money his mother already gifted to him." (Pl.'s Reply at 3-4, ECF No. 12.)

[1] "Identifiable funds are deemed a chattel for purposes of conversion, and conversion may be established where a party shows ownership or the right to possess specific, identifiable money." 90 C.J.S. Trover and Conversion § 16. A negotiable instrument may also be the subject of conversion. 18 Am. Jur. 2d Conversion § 11.

Plaintiff has the better of this argument. He is advancing his claim on the basis of funds gifted to him by his mother and specifically identifiable based on the value of the estate drafts she delivered into his possession. Under these circumstances, the likely finding is that Plaintiff has demonstrated a claim to specific and identifiable funds that are currently being withheld by the Defendant. After all, the proceeds of these drafts only entered the joint account to work around the questionable objection raised by Plaintiff's bank when he presented the estate drafts for deposit. By that time, the gift already had been effectuated by the delivery of the indorsed estate drafts to Plaintiff with donative intent.

Defendant's argument that Plaintiff cannot succeed because he was never a holder in due course of the "check" his mother later obtained is beside the point. (Def.'s Opp'n at 3.) The primary significance of the bank draft is that it corroborates Plaintiff's position that the funds were only deposited by his mother in order to facilitate the transfer of these same funds to Plaintiff. Thus, the check supports the inference that Plaintiff and his mother both understood that she would take back and deposit the estate drafts subject to his claim of ownership and then honor Plaintiff's claim of right through another instrument that would not be objectionable to his bank. On these facts, even if his mother had changed her mind upon her son's return of the estate drafts, Plaintiff still would be likely to prevail in his claim. A completed gift transfer cannot be undone by a change of heart on the donor's part, Bradford, 675 A.2d at 962, and Plaintiff's mother could not take back the estate drafts free of his claim. 11 M.R.S. §§ 3-1302(1)(b)(v), 3-1306.

C. Remaining Arguments

Defendant maintains that his wife was not competent to make a valid gift to Plaintiff. (Def.'s Opp'n at 4.) However, the representations found in Ms. Penaloza's affidavit and the

emails exchanged by Plaintiff and his mother that are attached to Plaintiff's motion reflect that Plaintiff's mother more likely than not was competent. Defendant's remaining arguments (that he never exercised control over of any check against his wife's wishes and that he cannot have converted his wife's alleged promise to make a gift) are beside the point. Defendant presumes to keep Plaintiff's funds because his wife deposited them into an account he held jointly with her and failed to effectuate a transfer to Plaintiff before her death. However, by the time Plaintiff's mother deposited the funds, she had already gifted them to her son by delivery of the estate drafts into his possession with a general indorsement. Her later deposit of the same drafts was subject to his claim of right to the proceeds.

D. Amount of the Attachment

Plaintiff requests an attachment in the amount of $85,000 rather than $83,000 to account for interest and costs. (Mot. at 1.) I award the attachment in the amount of $83,350, which consists of the value of the two estate drafts and Plaintiff's $350 filing fee.

Conclusion

Attachment, including attachment on trustee process, is hereby awarded in the amount of $83,350.

CERTIFICATE

Any objections to this Order shall be filed in accordance with Federal Rule of Civil Procedure 72.

So Ordered.

August 30, 2012

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

HERBERT v. MAKRECKY
Assigned to: JUDGE JOHN A. WOODCOCK, JR
Referred to: MAGISTRATE JUDGE MARGARET J. KRAVCHUK
Cause: 28:1332 Diversity-Property Damage

Date Filed: 07/19/2012
Jury Demand: Plaintiff
Nature of Suit: 380 Personal Property: Other
Jurisdiction: Diversity

Plaintiff

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